

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

ANGELA FUSCO )

v. )

C.A. No. 91-0333L )

DAVID MEDEIROS, THE BOARD OF PUBLIC )  
SAFETY OF THE CITY OF WARWICK, THE CITY )  
OF WARWICK, HOWARD HARONIAN, RAYMOND )  
ESPOSITO, JAMES HOVEY, WILLIAM FILENE'S )  
SONS COMPANY, MAY DEPARTMENT STORES )  
COMPANY, MARSHA FOGARTY, JOSEPH )  
KOECHER, BEVERLY SHEA, JANE DOE, )  
RICHARD ROE, JOHN DOE, ETC. )

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge.

This matter is before the Court on objections to a Findings and Recommendation issued by Magistrate Judge Hagopian on January 31, 1992. Pursuant to Fed. R. Civ. P. 12(b)(6), all defendants named in plaintiff Angela Fusco's Complaint, except the "City defendants" (i.e., the Board of Public Safety of the City of Warwick (the "Board"), the City of Warwick (the "City"), and individual Board members Howard Haronian, Raymond Esposito, and James Hovey), brought motions to dismiss the counts against them for failure to state claims upon which relief can be granted. Simultaneously, these defendants moved to dismiss the entire Complaint for failure to comply with the pleading requirements in Fed. R. Civ. P. 8(a) or, in the alternative, for both a more definite statement and a striking of allegations in the Complaint pursuant to Fed. R. Civ. P. 12(e) and 12(f), respectively. After considering the motions, Magistrate Judge

Hagopian recommended that Counts I through IV not be dismissed, but that Counts V through VII be dismissed for failure to state viable claims. Both plaintiff and the moving defendants object to portions of the Magistrate's Findings and Recommendation. After hearing oral arguments on this matter, the Court adopted Magistrate Judge Hagopian's ruling dismissing Counts V through VII.<sup>1</sup> Therefore, the Court now addresses only the defendants' objections to the Magistrate Judge's conclusions regarding Counts I through IV.

#### BACKGROUND

Angela Fusco's suit arises out of events that occurred while she was an employee at William Filene's Sons Company ("Filene's") in Warwick, Rhode Island. She alleges that David Medeiros, a security guard at the store who also worked as a police constable for the City, used his position to subject her to heightened scrutiny as well as to sexually harass her and other women. She alleges that, although she reported Medeiros's behavior to Joseph Koechel, the general manager of Filene's Warwick store, Koechel took no effective action.

According to plaintiff, the situation with Medeiros came to a head on June 19, 1991. She claims that on that day, Medeiros, acting as a loss prevention manager with police power,

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<sup>1</sup>At the hearing, the Court inadvertently stated that it agreed with and was adopting the Findings and Recommendation regarding Counts IV through VI. Clearly, however, the Court, which was discussing plaintiff's objections to the Findings and Recommendation, intended to adopt the dismissal of Counts V through VII.

unlawfully detained and arrested her on a false allegation that she had improperly marked down an item and sold it. She alleges that, although he had no reasonable grounds to detain or arrest her, Medeiros told her that he had been in contact with superior officers of the Warwick police department to authorize her prosecution. Plaintiff claims that, with the knowledge of Koechel and Marsha Fogarty, the personnel manager at Filene's Warwick store, Medeiros held her incommunicado against her will and denied her requests to call her attorney. Plaintiff further alleges that Medeiros used his authority as a police constable to coerce her into signing a statement and executing a promissory note in favor of Filene's. She claims that her employment was subsequently terminated, on the advice of Fogarty, Koechel, Filene's, and Filene's parent corporation, May Department Stores Company ("May Company").

Plaintiff alleges that she thereafter advised Filene's that she intended to seek legal redress as a consequence of these events, and that Filene's then attempted to mollify her by cancelling the promissory note. Additionally, plaintiff alleges that Beverly Shea, a divisional manager at Filene's Warwick store threatened Alison Freeman, a woman employee at that facility, with adverse employment action if Ms. Freeman gave testimony in support of plaintiff's claim. Plaintiff contends that she suffered emotional distress, economic injuries, and other damages as a result of these events.

Importantly, plaintiff contends that, at Filene's

request, the Board established a policy of appointing security guards as police constables to reduce the City's costs of providing police services and to benefit Filene's and May Company. Plaintiff alleges that Filene's and May Company, in recognition of this special and mutually beneficial relationship, added the City and its police constables as additional insureds on certain liability insurance policies. Plaintiff further alleges that, pursuant to this policy, the City defendants appointed Medeiros and other employees of Filene's or May Company as police constables and encouraged them to conduct investigations of crimes, to detain and arrest persons suspected of shoplifting and other offenses, to complete official police reports, and to otherwise act as peace officers. Finally, plaintiff alleges that the police constables were given this authority without any psychological screening, appropriate training, or field supervision.

In June, 1991, plaintiff filed a seven-count Complaint in this Court based on federal question jurisdiction with pendent state claims. Of the four counts that remain at issue, the first three assert civil rights claims under 42 U.S.C. § 1983 ("Section 1983"), while the fourth asserts a state law claim for intentional infliction of emotional distress. Specifically, in Count I, plaintiff alleges that Medeiros as well as Filene's and May Company (referred to collectively as the "Filene's corporate defendants") are liable to her under Section 1983 because Medeiros's conduct violated a number of her constitutional

rights. In Count II, plaintiff asserts that the City defendants, the Filene's corporate defendants, and Koechel are liable to her for establishing and/or instituting the grossly negligent policy of appointing police constables without proper screening, training, or supervision. In Count III, plaintiff alleges that an unknown number of Filene's management employees and/or Warwick police constables, Koechel, Fogarty, and Shea (collectively referred to as the "Filene's individual defendants") conspired with Medeiros to violate rights secured to her by the Constitution and laws of the United States. Finally, in Count IV, plaintiff asserts that the City defendants, Koechel, and the Filene's corporate defendants are liable to her for intentional infliction of emotional distress.

As noted above, the Filene's corporate and individual defendants responded to plaintiff's Complaint by filing a motion to dismiss the claims against them. The City defendants did not so move. Since Magistrate Judge Hagopian recommended that Counts I through IV not be dismissed, the Filene's defendants now urge the Court to reject the Magistrate Judge's conclusion and dismiss these counts. Plaintiff, on the other hand, argues that Counts I through IV state viable claims against each defendant named therein. For the reasons that follow, the Court sustains, in part, and overrules, in part, defendants' objections to the Magistrate Judge's Findings and Recommendation.

## DISCUSSION

### I. Standard of Review

The Court reviews the Magistrate Judge's Findings and Recommendation regarding dispositive motions, such as motions to dismiss, de novo. Fed. R. Civ. P. 72(b). To succeed on a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the moving party must establish that the non-moving party's claims are insufficient as a matter of law. National Credit Union Admin. Bd. v. Regine, 795 F. Supp. 59, 62 (D.R.I. 1992) (citing Harper v. Cserr, 544 F.2d 1121, 1122 (1st Cir. 1976)). In assessing the sufficiency of the claims, the Court must view all facts and inferences in the light most favorable to the non-moving party and must assume that all of the facts alleged in the complaint are true. Paradis v. Aetna Casualty & Sur. Co., 796 F. Supp. 59, 61 (D.R.I. 1992). The Court may grant the motion to dismiss only if it is clear from the pleadings that no possible set of facts can be proven in support of the non-moving party's claims for relief. Lopez v. Bulova Watch Co., 582 F. Supp. 755, 767 (D.R.I. 1984).

Regarding defendants' motion to dismiss the entire Complaint for failure to comply with the Rule 8 pleading requirements, the Court must determine whether the Complaint provides the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). Although the First Circuit has indicated that a civil rights claim under

Section 1983 must set forth "minimal facts...as to who did what to whom and why," Dewey v. Univ. of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. denied, 461 U.S. 944, 103 S.Ct. 2121, 77 L.Ed.2d 1301 (1983), the Supreme Court recently held that the liberal system of "notice pleading" precludes courts from requiring Section 1983 claims to contain more than a "short and plain statement of the claim showing that the pleader is entitled to relief." Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S.Ct. 1160, 1161-63, 122 L.Ed.2d 517 (1993)(quoting Fed. R. Civ. P. 8(a)(2)). Additionally, in assessing the Complaint, the Court is to construe the pleadings liberally. Fed. R. Civ. P. 8(f).

Along similar lines, in deciding whether to grant a motion for a more definite statement pursuant to Rule 12(e), the Court must determine whether the Complaint is sufficiently particular and intelligible to enable defendants to prepare their response. Fed. R. Civ. P. 12(e). Finally, a motion to strike pursuant to 12(f) requires the Court to determine if allegations in the Complaint are so "redundant, immaterial, impertinent, or scandalous" that they ought to be eliminated. Fed. R. Civ. P. 12(f); see also Alvarado-Morales v. Digital Equipment Corp., 843 F.2d 613, 618 (1st Cir. 1988). The defendants must show that the challenged allegations are completely unrelated to plaintiff's claims and that their presence in the pleading will be prejudicial to the defendants. United States v. Fairchild Indus., Inc., 766 F. Supp. 405, 408 (D.C.Md. 1991); Russo v.

Merck & Co., 138 F. Supp. 147, 149 (D.R.I. 1956).

## II. Pleading Sufficiency

The Court turns first to defendants' arguments that the entire Complaint is so vague that it should be dismissed for failing to comply with Fed. R. Civ. P. 8, or, in the alternative, that, pursuant to Fed. R. Civ. P. 12(e), plaintiff should be required to provide a more definite statement of the grounds upon which she seeks relief. Although Magistrate Judge Hagopian did not specifically address these motions, the defendants continue to press them before the Court. Nonetheless, the Court declines to grant either motion. While portions of the Complaint may not be particularly artful, the Complaint adequately alerts the defendants about the nature of the claims and certainly allows defendants to prepare their defense, as generally required by Rules 8 and 12(e). Conley, 355 U.S. at 47, 78 S.Ct. at 103. For these reasons, the Court determines that dismissal on Rule 8 grounds is unwarranted and a more definite statement pursuant to Rule 12(e) is unnecessary. Additionally, the Court determines that the allegations in the Complaint are not so irrelevant and prejudicial that they ought to be eliminated, and thus denies defendants' motion to strike pursuant to Rule 12(f).

## III. 1983 Claims

Next the Court turns to the substance of the claims asserted in the first three counts of the Complaint. Plaintiff therein avers claims under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Section 1983 imposes liability on

every person who, acting under color of state law, deprives another person of rights, privileges, or immunities secured by the Constitution and laws of the United States.<sup>2</sup> In the instant case, plaintiff alleges that defendant Medeiros, while acting as a police constable, violated a number of her constitutional rights under color of state law. As discussed in greater detail below, she further contends that Medeiros acted pursuant to policies established and implemented by the City defendants and certain Filene's defendants, and that Medeiros acted in concert with a number of Filene's individual defendants.

A. Count I: Unlawful Arrest and Detention

In Count I, plaintiff basically alleges that Medeiros unlawfully detained and arrested her. She contends that, coincidental to this detention and arrest, Medeiros deprived her of a number of her constitutional rights, including liberty from unreasonable search and seizure, the right to due process of law, and the right to equal protection of the law. She claims that Medeiros and the Filene's corporate defendants are liable to her for Medeiros's allegedly unlawful conduct. In his Findings and Recommendation, Magistrate Judge Hagopian explained that Count I

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<sup>2</sup>Section 1983 provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

of the Complaint stated a viable claim with sufficient particularity against Medeiros. However, the Magistrate Judge was silent regarding the Count I claims against the Filene's corporate defendants. Medeiros and the Filene's corporate defendants argue that the Court should dismiss the Count I claims against them.

1. Medeiros

Medeiros argues that Count I of plaintiff's Complaint fails to allege a Section 1983 claim against him. He contends first, that plaintiff did not and cannot allege that he was acting under color of state law. Second, he argues that the Complaint fails to allege that he unlawfully deprived plaintiff of any constitutional or other federal legal rights.

a. Under Color of State Law

Plaintiff essentially alleges that, because Medeiros was employed simultaneously as a private security guard and a police constable for the City, Medeiros was acting under color of state law when he allegedly unlawfully detained and arrested her. Medeiros argues that plaintiff fails to allege facts creating a nexus between his status as a constable and the alleged deprivation of her rights. He notes that plaintiff does not claim that Medeiros was wearing a uniform or a badge, that Medeiros announced that he was detaining her pursuant to his authority as police constable, or that she knew at the time of her detention that Medeiros was a police constable. Medeiros concludes, therefore, that plaintiff's Count I claim against him

fails to allege that he misused power he possessed by virtue of state law or that the alleged violations were made possible only because he was "clothed with the authority of state law," as is necessary for a successful Section 1983 claim. West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988) (quoting United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed.2d 1368 (1941)); see also Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), overruled in part on other grounds by Monell v. Dept. Social Services, 436 U.S. 658, 695-701, 98 S.Ct. 2018, 2038-41, 56 L.Ed.2d 611 (1978).

The Court agrees with Medeiros that liability under Section 1983 requires action under color of state law. The Court further agrees that, if Medeiros was acting solely as a private security guard at the time he allegedly detained and arrested plaintiff, the requisite abuse of state authority would be lacking. See, e.g., Robinson v. Davis, 447 F.2d 753, 758-59 (4th Cir. 1971) (part-time campus security officers who were also part-time police officers were not acting under color of law when they requested students to appear at a college administrative hearing because they were acting pursuant to instructions of college officials, not as policemen of town), cert. denied, 405 U.S. 979, 92 S.Ct. 1204, 31 L.Ed.2d 254 (1972); Watkins v. Oaklawn Jockey Club, 183 F.2d 440, 443 (8th Cir. 1950) (off-duty sheriff employed by private racetrack did not act under color of state law when he ejected patron from racetrack because he was acting pursuant to track's reserved right to order persons off

premises). However, the Court recognizes that the issue of whether Medeiros was acting pursuant to his authority as a police constable or as a private security guard involves a question of fact. See, e.g., Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980) (in determining that off-duty police officer working as security guard in bank was acting under color state of law when he detained bank customer, court considered a number of factual indicia, including that officer flashed his police identification and introduced himself as police officer when he intercepted customer, that the use of off-duty police officers as bank security guards was part of police department secondary hiring program, and that off-duty officers acting as security guards were instructed that their duty was to police department, not bank, if they believed crime had been committed).

Here, the Court concludes that plaintiff has adequately alleged that Medeiros was acting under color of state law for pleading purposes. The Complaint sets out allegations that Filene's and the City arranged to have Filene's private security guards deputized as Warwick police constables for the limited purpose of patrolling the Filene's Warwick store for shoplifters. It further alleges that Medeiros was one of the security guards who was so deputized. Additionally, the Complaint alleges that, after Medeiros detained plaintiff, he told her that he had been in contact with superior officers at the Warwick police department to authorize her prosecution. The Complaint also alleges that Medeiros used his authority as a police constable as

well as the threat of prosecution to coerce plaintiff to sign a statement and execute a promissory note. Therefore, the allegations in the Complaint provide adequate grounds from which a factfinder could infer that Medeiros was acting pursuant to his duties as a police constable at the time he allegedly detained and arrested plaintiff. Thus, at this stage of the proceedings, when the allegations are accepted as true and viewed in the light most favorable to plaintiff, plaintiff has sufficiently pleaded that Medeiros was acting under color of state law when he allegedly detained and arrested her.

**b. Deprivation of Rights**

Medeiros also contends that, even if the description of his actions in the Complaint are accepted as true, the Complaint fails to allege that Medeiros unlawfully deprived plaintiff of her federally protected rights. He claims that, as a private security guard working for a store owner, he had a right to detain plaintiff pursuant to R.I. Gen. Laws 1956 (1981 Reenactment) § 11-41-21(b), which grants merchants the right to detain suspected shoplifters, while, if he were considered to be working as a police constable, he had a right to detain her pursuant to R.I. Gen. Laws 1956 (1981 Reenactment) § 11-41-21(a), which authorizes police officers to detain suspected shoplifters. He concludes that under the facts alleged, plaintiff cannot seek redress for the detention or any temporary deprivation of rights she may have experienced incidental to the detention.

However, in reaching his conclusions, Medeiros ignores

a number of plaintiff's factual allegations which suggest that Medeiros may have violated plaintiff's constitutional rights. Importantly, plaintiff alleges that she had done nothing wrong and that, therefore, Medeiros had no probable cause to detain and arrest her. Additionally, she alleges that Medeiros sequestered her in a room, denied her requests to speak with her attorney, threatened her with prosecution, and coerced her to sign a statement and execute a promissory note in favor of Filene's. She also seems to allege that Medeiros's unlawful conduct toward her occurred because she is a woman. Since the Court must accept all factual allegations set forth in the Complaint as true, plaintiff has adequately alleged that Medeiros deprived her of rights protected by Section 1983. Therefore, plaintiff's Count I claim against Medeiros cannot be dismissed at this stage of the proceedings.

## 2. Filene's Corporate Defendants

Plaintiff also names the Filene's corporate defendants as wrongdoers in Count I. Magistrate Judge Hagopian did not address the motion to dismiss as to these defendants. Nonetheless, it is clear to the Court that plaintiff fails to state a valid claim against these defendants under Count I. Plaintiff attempts to have the Filene's corporate defendants held vicariously liable for the actions of their alleged employee, Medeiros. Importantly, though, the doctrine of respondeat superior does not apply to Section 1983 claims.

There is no doubt that a city cannot be vicariously

liable under Section 1983 for the misdeeds of its employees or agents. Polk County v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 453, 70 L.Ed.2d 509 (1981); Monell v. Dept. of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Additionally, although neither the Supreme Court nor the First Circuit has indicated whether or not a private actor can be liable under Section 1983 for actions of its employees or agents, virtually all of the circuits which have analyzed this issue have responded in the negative. See, e.g., Rojas v. Alexander's Dept. Store, Inc., 924 F.2d 406, 408-09 (2nd Cir. 1990) (store cannot be liable for Section 1983 claim under theory of respondeat superior for alleged deprivation of rights that occurred when store security guard detained customer suspected of shoplifting), cert. denied, 112 S.Ct. 52, 116 L.Ed.2d 30 (1991); Iskander v. Forest Park, 690 F.2d 126, 128 (7th Cir. 1982) (same); Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982) (same); see also McIlwain v. Prince William Hosp., 774 F. Supp. 986, 990 (E.D.Va. 1991) (theory of respondeat superior not available to hold hospital liable under Section 1983 for actions of its employees); Mitchell v. Chontos, 756 F. Supp. 243, 249 n. 9 (D.S.C. 1990) (same); Temple v. Albert, 719 F. Supp. 265, 268 (S.D.N.Y. 1989) (same). This Court similarly concludes that, for purposes of Section 1983 vicarious liability, "there is no tenable reason to distinguish a private employer from a municipality." Temple, 719 F. Supp. at 268. Therefore, the Count I claim against the Filene's corporate defendants will be dismissed.

**B. Count II: City and Store Policy**

In Count II, plaintiff focuses on the alleged policy of the City defendants and certain Filene's defendants to hire people as police constables without adequate screening, training, or supervision. She claims that the City defendants, the Filene's corporate defendants, and Filene's employee Koechel established and implemented this policy with reckless disregard for her rights. Therefore, she contends, these defendants are liable for the injuries which she alleges she incurred as a direct result of the policy. The Filene's corporate defendants and Koechel argue that Count II does not state a claim against them because they cannot be liable under Section 1983 for any such alleged lack of screening, training, or supervision.

**1. Filene's Corporate Defendants**

As explained above, Section 1983 liability requires direct action under color of state law which causes a deprivation of a person's federal rights. 42 U.S.C. § 1983; Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), overruled in part on other grounds by Daniels v. Williams, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664-65, 88 L.Ed.2d 662 (1986). The Filene's corporate defendants argue, first, that the Complaint fails to allege facts upon which they, as private entities, could be held to have acted under color of state law. Secondly, these defendants contend that the Complaint fails to allege that they, as corporations, directly acted in any manner that deprived plaintiff of any rights. Nonetheless, as explained

below, the Court determines that plaintiff has successfully pleaded a Section 1983 claim against the Filene's corporate defendants.

a. Action Under Color of State Law

In order to hold the Filene's corporate defendants liable under Section 1983, plaintiff must show that these private defendants acted under color of state law. There are a number of theories under which a Court may deem a private party's action "under color of state law." Although plaintiff seems to rely on one particular theory, based on the allegations in her Complaint, the Court determines that two theories support such a determination at this stage in the proceedings.

Under the theory relied on by plaintiff, conduct by private actors is characterized as "under color of state law" if, due to a relationship between the private actor and the state, the conduct of the private actor can be "fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). Three inquiries are especially relevant in determining this fact-bound issue:

(1) the extent of any financial or regulatory "nexus" between defendants and the City; (2) the extent that the challenged activity assumed by the private actor was a "traditionally public function;" and (3) the existence of a "symbiotic relationship" between defendants and the City from which both profited. Ponce v. Basketball Fed'n of Puerto Rico, 760 F.2d 375, 377 (1st Cir. 1985) (citing Blum v. Yaretsky, 457 U.S. 991, 1004-05, 102 S.Ct.

2777, 2785-86, 73 L.Ed.2d 534 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447, 449 (1st Cir. 1983)).

In this instance, the third factor is most telling.

As the Magistrate Judge noted, plaintiff alleges that a symbiotic relationship existed between the City defendants and the Filene's corporate defendants regarding the use of police constables in the Filene's Warwick store. To establish a symbiotic relationship which can support a determination that the private party's action was equivalent to state action, the plaintiff must show that the government "has so far insinuated itself into a position of interdependence with [the Filene's corporate defendants] that it must be recognized as a joint participant in the challenged activity...." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961); Ponce, 760 F.2d at 381-82. A key factor in determining if such a symbiotic relationship exists is whether the state benefitted from the challenged activity. Burton, 365 U.S. at 723-24, 81 S.Ct at 861; Ponce, 760 F.2d at 381-82.

In this case, plaintiff's allegations could support a finding that the City and the Filene's corporate defendants were involved in a joint venture regarding the appointment of Filene's employees as police constables. Similarly, the allegations could support a determination that both parties mutually benefitted from the appointment of such constables without the need to pay for screening, training, and supervision. For instance, the

Complaint can be read to allege that the City benefitted by saving money through the appointment of police constables to patrol the Filene's Warwick store, that the Filene's corporate defendants benefitted by having added protection against crime in their store, and that both benefitted by not having to expend money on adequate screening, training programs, and supervision for the constables. Plaintiff alleges that in recognition of the mutually beneficial relationship, the Filene's corporate defendants included the City and its police constables as additional insureds on certain liability insurance policies. Accordingly, the Court concludes that plaintiff has alleged facts regarding the relationship between the Filene's corporate defendants and the City which suggest that the alleged actions of the Filene's corporate defendants in implementing a policy of employing police constables without proper screening, training, or supervision could be attributed to the state.

Under a second theory, private persons who act in concert with the state or a state agent in depriving a person of her rights under color of state law may themselves be deemed to have acted "under color of state law." See Dennis v. Sparks, 449 U.S. 24, 27-28, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970); Wagenmann v. Adams, 829 F.2d 196, 209 (1st Cir. 1987). Courts have noted that this theory can be applied to hold store owners liable under Section 1983 for willfully participating in joint activity with the state or its

agents in detaining customers accused of shoplifting. See, e.g., Murray v. Wal-Mart, Inc., 874 F.2d 555, 559 (8th Cir. 1989); Duriso v. K-Mart No. 4195, Division of S.S. Kresge Co., 559 F.2d 1274, 1277 (5th Cir. 1977); Smith v. Brookshire Bros., Inc., 519 F.2d 93, 94 (5th Cir. 1975), cert. denied, 424 U.S. 915, 96 S.Ct. 1115, 47 L.Ed.2d 320 (1976); Rojas v. Alexander's Dept. Store, Inc., 654 F. Supp. 856, 858-59 (E.D.N.Y. 1986), aff'd, 924 F.2d 406 (2nd Cir. 1990); Jones v. Sears, Roebuck & Co., 495 F. Supp. 319, 321 (S.D.Ga. 1980).

Plaintiff does not specifically rely on this theory in her Count II claim. However, the Complaint alleges that the Filene's corporate defendants requested that the City authorize Filene's employees to act as police constables in conducting investigations and detentions in the Filene's Warwick store; that the Filene's corporate defendants added the City and its police constables as additional insureds on certain insurance policies; that the Filene's corporate defendants aided the City defendants in establishing and implementing the program, which did not appropriately screen, train, or supervise the newly deputized police constables; and that both parties benefitted from the joint action. Thus, the allegations in the Complaint support a determination that the Filene's corporate defendants acted "under color of state law" by acting in concert with the City defendants in creating and implementing the alleged policy of employing police constables without adequate screening, training, or supervision.

b. Action Causing Deprivation of Rights

A determination that the Complaint alleges facts adequate to find, at this stage, that the Filene's corporate defendants acted under color of state law does not end the inquiry. The Complaint must also adequately allege that direct action by the Filene's corporate defendants led to the deprivation of plaintiff's rights. Despite defendants' argument to the contrary, the Court determines that the Complaint contains allegations sufficient to support such a determination.

As discussed above, a defendant cannot be held vicariously liable under Section 1983. However, a private corporation, like a municipality, can be held liable under this law when its own actions are the driving force behind the deprivation of a person's rights, such as when a corporate policy causes a deprivation of rights. Pembaur v. Cincinnati, 475 U.S. 469, 478-81, 106 S.Ct. 1292, 1297-98, 89 L.Ed.2d 452 (1986) ("The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible"); Monell, 436 U.S. at 694, 98 S.Ct. at 2037-38 (local government unit can be liable under Section 1983 when execution of the government's official policy or custom, whether made by its lawmakers or by those whose acts represent official policy, inflicts the injury); cf. Rojas, 924 F.2d at 408-09 (for private employer to be liable under Section 1983 for alleged deprivation of rights that

occurred when store security guard detained customer suspected of shoplifting, store had to have official policy that caused constitutional tort); Iskander, 690 F.2d at 128-29 (store could not be liable under Section 1983 because no showing that store had impermissible policy that was the moving force behind the constitutional violation); McIlwain, 774 F. Supp. at 990 (hospital could only be liable under Section 1983 for alleged deprivation of rights committed by hospital employees if employees committed such violations pursuant to a hospital policy).

In this case, plaintiff alleges that policies of the Filene's corporate defendants and the City defendants led to the deprivation of her rights. Specifically, she charges that the Filene's corporate defendants chose to act in conjunction with the Warwick police in establishing and implementing a policy of deputizing Filene's employees as police constables without adequate screening, training, or supervision, and that her constitutional rights were violated as a result of such policy. Along these lines, the Supreme Court recently held that a city's failure to properly train its police can subject the city to liability under Section 1983. Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). The Supreme Court set forth a number of conditions which must be established before such liability can be found: (1) the "failure to train reflects a 'deliberate' or 'conscious' choice by a municipality," id., 489 U.S. at 389, 109 S.Ct. at 1205, (2) the choice "amounts to

deliberate indifference to the rights of persons with whom the police come into contact," id., 489 U.S. at 388, 109 S.Ct at 1204, and (3) inadequacy in the city's training program actually caused the ultimate injury, id., 489 U.S. at 390-91, 109 S.Ct. at 1205-06. See also Bordanaro v. McLeod, 871 F.2d 1151, 1158-63 (1st Cir.), cert. denied sub nom., Everett v. Bordanaro, 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989).

Plaintiff's Complaint sets forth all of the required allegations to implicate the Filene's corporate defendants' actions in the alleged deprivation of plaintiff's rights. She sufficiently alleges that the Filene's corporate defendants deliberately chose to allow the City to deputize Filene's employees as police constables without providing proper screening, training, or supervision; that such policy was implemented with a grossly negligent disregard for the rights of persons with whom the police constables came into contact; and that the inadequate screening, training, and supervision directly led to the deprivation of her rights. More specifically, she alleges that the policy allowed Medeiros, a man who employees of both the Filene's corporate defendants and the City knew to have solicited sexual favors from women employees and customers, to use his authority as a police constable to unlawfully investigate, detain, and arrest plaintiff as well as to pressure her into granting him sexual favors. It may be difficult for plaintiff ultimately to prove that the failure to screen, train, or supervise amounted to a policy which the defendants

deliberately chose to implement; that such alleged policy was implemented with reckless disregard to persons' rights; or that inadequacies in screening, training, or supervision caused the alleged deprivation of her rights. However, plaintiff's allegations adequately support a determination at this stage of the proceedings that actions of the Filene's corporate defendants may have led to a deprivation of plaintiff's rights.

2. Koechel

Plaintiff also asserts a claim against individual defendant Koechel in Count II. She alleges that Koechel, like the Filene's corporate defendants and the City defendants, is liable to her under Section 1983 for his role in implementing the policy of authorizing Filene's employees to act as police constables without proper screening, training, or supervision. Although very short on factual details, the Complaint alleges that Koechel was personally involved in implementing the policy in the Filene's Warwick store. Additionally, as discussed above, the Complaint alleges that the policy led to the deprivation of plaintiff's rights.

Accepting these allegations as true at this point in the proceedings, the Court determines that the Complaint adequately alleges the basic elements of a Section 1983 claim against Koechel. First, the allegations in the Complaint could support a finding that Koechel acted in concert with the City defendants in establishing and implementing the policy of deputizing police constables without screening, training, or

supervision. Thus, the Complaint adequately pleads that Koechel acted "under color of state law." See Dennis, 449 U.S. at 27-28, 101 S.Ct. at 186; Adickes, 398 U.S. at 152, 90 S.Ct. at 1605-06; Wagenmann, 829 F.2d at 209. Additionally, since the Complaint also contains allegations that Koechel himself was involved in implementing the policy in question and that the policy led to the deprivation of plaintiff's rights, it sufficiently pleads that the defendant's action caused a deprivation of plaintiff's rights. See Sample v. Diecks, 885 F.2d 1099, 1114-16 (3rd Cir. 1989) (policy-making official can be liable under Section 1983 for establishing unconstitutional policy which causes deprivation of person's rights).

C. Count III: Conspiracy

In Count III, plaintiff alleges that a number of Filene's individual defendants, including Koechel, Fogarty, Shea, and an unknown number of Filene's employees and/or Warwick police constables, referred to as Jane Doe, Richard Roe, and John Doe, conspired with Medeiros to deprive plaintiff of her rights protected under the Constitution and laws of the United States. Specifically, she alleges that these Filene's individual defendants met with Medeiros and agreed to take adverse employment action against her. As discussed above, in order to state a Section 1983 claim for conspiracy between a public official and private persons, the plaintiff must allege that: (1) the private persons and the public official conspired to deprive plaintiff of a right secured by the Constitution and laws

of the United States, (2) the private persons and the public official conspired to deprive plaintiff of such a right under color of state law, and (3) an actual deprivation of a right occurred. See Dennis, 449 U.S. at 27-28, 101 S.Ct. at 186; Adickes, 398 U.S. at 152, 90 S.Ct. at 1605-06; Wagenmann, 829 F.2d at 209. Although Magistrate Judge Hagopian determined that the allegations in plaintiff's Complaint fulfill these requirements, the Court disagrees.

Despite the conclusory statement in the Complaint that the Filene's individual defendants conspired with Medeiros to deprive plaintiff of rights secured by the Constitution and laws of the United States, the Complaint does not set forth any factual allegations supporting such a claim. The Complaint contains allegations that the Filene's individual defendants met with Medeiros and took adverse employment action against plaintiff pursuant to such a meeting. However, factual allegations that this alleged conspiracy resulted in a deprivation of plaintiff's rights are conspicuously absent from the Complaint. Although adverse employment action motivated by discrimination can constitute a violation of equal protection which gives rise to a Section 1983 claim, see, e.g., Sorlucco v. New York City Police Dept., 971 F.2d 864, 870 (2nd Cir. 1992), Count III does not contain allegations that the adverse employment action allegedly engaged in by the Filene's individual defendants was so motivated. Further, even if the Complaint could be interpreted as alleging that the Filene's individual

defendants conspired with Medeiros to take adverse employment action against plaintiff because she is a woman, plaintiff provides no facts tying such an alleged conspiracy to actions by Medeiros in his capacity as police constable. Therefore, a determination that the alleged conspiracy contemplated action to deprive plaintiff of her rights under color of state law is precluded.

Additionally, plaintiff cannot leapfrog these obstacles by pointing to Medeiros's alleged conduct in detaining and arresting her. Although the Complaint adequately alleges that such conduct by Medeiros involved both action under color of state law and a violation of plaintiff's rights, plaintiff does not provide adequate factual allegations to connect the Filene's individual defendants to Medeiros's alleged conduct. The Complaint fails to allege, either generally or via specific facts, that Medeiros's actions in detaining plaintiff was part and parcel of the alleged conspiracy. Further, the Complaint nowhere contends that prior to the alleged detention, the Filene's individual defendants discussed such action with Medeiros or encouraged him to take such action. The Complaint does allege that Koechel and Fogarty knew that Medeiros was detaining plaintiff and that, subsequently, they were involved in terminating plaintiff's employment at Filene's. It also states that, after plaintiff announced she was seeking legal redress, Fogarty retaliated against her and Shea threatened a co-worker with adverse employment if the co-worker testified on plaintiff's

behalf. However, like the remaining allegations in the Complaint, such allegations are inadequate to support a determination that the individual defendants "jointly engaged with state officials in the prohibited action." Adickes, 398 U.S. at 152, 1605-06; see also Tower v. Glover, 467 U.S. 914, 920, 104 S.Ct. 2820, 2824, 81 L.Ed.2d 758 (1984); Dennis, 449 U.S. at 27-28, 101 S.Ct. at 186. Therefore, Count III must be dismissed.

#### IV. State Law Claims

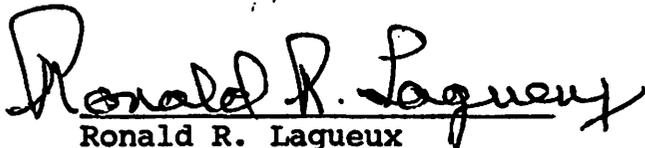
In Count IV, plaintiff asserts a state law claim for intentional infliction of emotional distress. She alleges that Medeiros intended to and did cause her emotional distress. She claims that Koechel, the Filene's corporate defendants, and the City defendants are liable to her because Medeiros inflicted such emotional distress while acting as an agent of and pursuant to the policies of these defendants. The primary argument advanced by Koechel and the Filene's corporate defendants regarding Count IV is that, since all of the federal question claims should be dismissed and there is no diversity of citizenship in this case, the pendent state law claims should likewise be dismissed. In accord with the Court's decision that plaintiff has sufficiently pleaded federal question claims against these defendants in Count II, defendants' argument fails. Recognizing that Count IV sufficiently pleads a claim for intentional infliction of emotional distress and that this alleged state law claim, which arises out of facts identical to those upon which the Section

1983 claims are based, forms part of the same case or controversy as the Section 1983 claims, the Court denies defendants' motion to dismiss Count IV. See 28 U.S.C. § 1367(a); United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

#### CONCLUSION

For the foregoing reasons, the Court sustains, in part, and overrules, in part, defendants' objections to the Magistrate Judge's Findings and Recommendation. Specifically, the Court denies Medeiros's motion to dismiss Count I, but grants the Filene's corporate defendants' motion as to this count. Regarding Count II, the Court denies the motion to dismiss brought by both the Filene's corporate defendants and Koechel. On the other hand, the Court grants the Filene's individual defendants' motion to dismiss Count III. Finally, the Court denies the motion to dismiss Count IV brought by both the Filene's corporate defendants and Koechel.<sup>3</sup>

It is so Ordered.



Ronald R. Lagueux  
Chief Judge  
June 22, 1993

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<sup>3</sup>To summarize, as a result of this Memorandum and Order the only counts that remain are as follows: (1) Count I against Medeiros; (2) Count II against the City defendants, the Filene's corporate defendants, and Koechel; and (3) Count IV against the City defendants, the Filene's corporate defendants, and Koechel.